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INTERNATIONAL GUARANTEES OF RELIGIOUS LIBERTY

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SUMMARY

Statement of Problem

Reports reaching the United States during the past few years have indicated that freedom of worship and religious liberty have been subjected to increasing restraints in many foreign countries. Some reports have stated that in some countries American nationals engaged in religious and missionary work have encountered difficulties in carrying on their humanitarian activities even when authorized by treaty agreements.

The United States, convinced by its own experience of the values of assuring religious liberty to all inhabitants, has long sought to obtain liberal privileges in this respect for its nationals abroad, through diplomatic negotiation and treaty arrangement. It has also advocated the adoption of liberal policies toward religious activities by other countries hitherto inclined to persecute or discriminate against religious minorities or opposed to freedom of activity by others than those of an officially established faith.

The United Nations have declared that their war aims include the securing of religious freedom.

In view of the reports that have been received, the question arises what steps should be taken by the United States to secure religious freedom abroad in the years to come.

The Nature of Religious Liberty

Religious liberty relates in the first instance to the freedom of the individual to worship as he may see fit. As such, religious freedom is often said to belong in the category of the "rights of man." When recognized as such, it is guaranteed by municipal law.

Religious liberty in the fullest sense, however, is not realized unless the individual can participate in group activities related to worship, to the perpetuation and the propagation of his faith, and unless religious organizations are allowed to develop to sustain and forward the activities of the individuals who profess the same faith.

Religious activities are properly a matter of concern to the State. Their regulation lies within the domain of State authority. The individual must respect the right of the State to supervise the activities of individuals, groups, and organizations in the interest of public security, morals, and welfare. On the other hand it must be appreciated that by religion the individual seeks to worship and to place himself in contact with a Deity or Force that is higher than the State. Hence the room for conflict between the Church and State.

Religious Liberty in International Law

International Law becomes concerned with religious liberty when the subject of one State resident within another may be discriminated against or maltreated because of his foreign nationality.

The writers on International Law agree that there is no generally accepted postulate of International Law that every State is under legal obligation to accord religious liberty within its jurisdiction. They acknowledge that if the State wishes to establish a given communion, endowing it with special rights and privileges, it may do so. However, they agree on the other hand, that if a State persecutes any of its inhabitants who may be religious dissenters in an inhumane and tyrannical manner on account of their religious beliefs, other States may be justified in trying to put an end to such uncivilized practice.

A large number of bilateral and multilateral treaties have been concluded during the past one hundred years providing for religious liberty. For the States adhering to these agreements, religious liberty in accordance therewith becomes an international obligation having the force of law.

The Practices of States in Instances in Which Religious Liberty Has Been Denied

A majority of the States of the world have assumed for themselves the idea that the State has a responsibility for seeing that the individual is accorded freedom of conscience and the right to worship.

The files of diplomatic correspondence show that on numbers of occasions the Great Powers of Europe and the United States have requested and demanded that nations failing to make any provision for religious freedom do so by adding to their own laws or by entering into treaty commitments.

Protests have been made by the Great Powers of Europe and the United States in some cases where foreign States have discriminated against native Christians and Jews within their own lands, or persecuted them in a barbarous manner. Some European States have intervened to protect religious minorities against such treatment.

Treaties Calling for Religious Liberty

Provisions for religious liberty, to one extent or another, have been written into a large number of treaties and conventions during the last one hundred years. The United States has been an active participant in the negotiation and enforcement of such international undertakings.

Five kinds of treaties have been noted for including such provisions:-
(1) bilateral treaties of amity, commerce, and navigation, which usually provide for religious liberty for nationals of each of the Contracting Parties in the territory of the other; (2) treaties of peace and cession, guaranteeing religious liberty to the inhabitants of territories passed from one State to another; (3) multilateral conventions dealing with colonial possessions and mandates, assuring religious liberty to natives, and opening the door to foreign missionaries; (4) multilateral conventions for the recognition of new States, whereby the latter may

be required to guarantee religious freedom to their subjects as a prerequisite to full admission to the society of States; (5) Minorities Treaties, stipulating rights and privileges for religious minorities in the states of Central and Eastern Europe.

The practice of concluding such arrangements has become general during the last century. A very large body of conventional international law has thereby been built up. The custom of negotiating such agreements in connection with the major peace settlements has become well established.

Efforts to obtain a universal guarantee of religious liberty, binding on all States, have not been successful heretofore.

Recommendations for the Future

All treaty arrangements guaranteeing religious liberty should be re-examined prior to the conclusion of the present War in the light of present-day circumstances.

The phraseology employed in the commercial treaties of the United States should be considered in relation to the reports now being assembled by the Committee on Religious Liberty regarding the actual status of religious liberty in the foreign countries.

An international guarantee for religious liberty in dependent areas should be drawn up in view of experience with the General Acts of Berlin and Paris (relating to Africa), and the Mandate Agreements.

Thought should be given to framing a provision respecting religious freedom to be inserted in a general International Bill of Human Rights which might be adopted at the conclusion of the War.

Study should be devoted to the advisability of establishing a Religious Commission as a part of the post-war International Organization to have jurisdiction over matters pertaining to religious liberty and the execution of treaty commitments.

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THE CONCEPT OF RELIGIOUS LIBERTY IN INTERNATIONAL LAW

The Purpose of this Paper

The Committee on Religious Liberty of the Foreign Missions Conference and the Federal Council of Churches, seeking to discover ways and means by which religious liberty may be more effectively safeguarded after the conclusion of the present War, asked me to prepare a paper on The Concept of Religious Liberty in International Law. As I understand it, the Committee wishes to know (1) to what extent international law embodies a principle that each State must accord religious liberty to all inhabitants, and (2) to what extent it would be proper to endeavor to get provisions dealing with religious liberty inserted in the treaties which may be drawn up after the end of the war.

The General Nature of Religious Liberty

The deliberations of the Committee on Religious Liberty heretofore have brought out that what is sought through guarantees for what is called "religious liberty" include: (1) the right of the individual to worship according to the dictates of his own conscience, (2) freedom for the individual to meet with others for this purpose, without being interfered with so long as public order and morality are not disturbed, (3) security against civic disabilities, discrimination or persecution on account of the profession of particular religious beliefs, (4) liberty to teach and preach to non-converts, (5) opportunity to engage in charitable activities, and (6) permission to build up church organizations which may associate with bodies of a similar purpose in other lands.

Such a listing of the elements of religious liberty reveals that while the first objective is that of securing liberty to the individual to worship as he may see fit, the larger purposes are not met, and indeed the practice of individual religious beliefs cannot be fully carried out, unless this liberty also embraces group activities, and the development of independent religious organizations. This triune nature of religious liberty makes the legal problem of handling the matter much more complex than it would be if only liberty for the individual to believe in his heart what he wished and to worship privately within his own dwelling were at stake.

Religious liberty, or at any rate freedom of conscience in the narrower sense, has customarily been regarded as one of the fundamental "rights of man," along with freedom of speech and the right to earn a livelihood. As such it is properly a matter which comes within the ambit of relations between the individual and the State; therefore, within the scope of law.

There has been long argument as to the source and character of human rights. There are those who have contended that God has endowed all men with certain "inalienable rights," which do not flow from the State, and which no State has any right to infringe or take away. There are others who maintain that once man has made a social compact, entering into society and setting up the State, the State becomes all-powerful, and all individual rights become derivable from it. There is another school of thought which maintains that there are some things indispensable to man, of which freedom of conscience and worship is one, which the State as a social instrumentality naturally recognizes and promotes as a part of its sociological functioning.

Space does not permit a discussion of the merits of these arguments here. They are enumerated because they have exercised a profound influence upon the status of religious liberty in various countries and at different times, and because they have a good deal to do with the position which religious liberty occupies in the laws of the different States.

This much is clear today: The modern State, whether totalitarian or democratic, has acted upon the assumption that it has jurisdiction over all persons within its domain, and that it is entitled to legislate upon all matters affecting both persons and things within that domain. There is, of course, a good deal of difference between the extremes to which the totalitarian and the democratic States will go in regulating the affairs of the individual. But the difference is essentially one of degree and purpose, rather than of kind. The democratic State proceeds upon the assumption that the function of the State is to promote the welfare of all by first protecting and furthering the legitimate interests of the individual. Hence it surrounds the individual with rights first, duties second. And it seeks to make the State strong indirectly and secondly by making each individual strong and satisfied in his own peculiar sphere. The totalitarian State, on the other hand, regards the State as the primary objective, and seeks to endow it with power through exalting its rights over the individual through maximizing the duties of the individual to the group and the State, through building up its strength through the labor of all individuals.

The essence of all this is that in the modern world the individual must look to the State for the guarantee of human rights. The individual is in fact subject to the control of thought, deed, and worship by the State, however desirable or undesirable this may be. The State has become Leviathan. In places it has gone even further and become Behemoth. Religious Liberty has become a matter in which the State does exercise a determinative influence.

If the State denies freedom of conscience to foreigners because they are foreigners, or if it persecutes its own inhabitants in a particularly notorious manner because of their beliefs, religious liberty may become an international rather than a purely domestic issue. It is principally here that the concept of religious liberty and the principles of international law come into contact.

Individual Liberty - State Sovereignty - Religious Bodies

In dealing with religious liberty one immediately brings to the fore a tri-cornered problem which touches the most delicate phase of individual-State relationships.

Any doctrine of human rights, or of individual liberties, implies that there is a certain realm in which the individual is master of his actions. Within this realm there may be no interference or infringement of the individual's own thoughts and activities by any other person or body, including the State, so long as the rights of others are respected and public order is not disturbed. Counterposed to this is the sovereignty of the State, which is "the supreme, absolute, uncontrollable power by which any independent State is governed." By the very meaning of sovereignty, "the decree of the sovereign makes law." While the State may accept limitations upon the exercise of its sovereignty, through the admission that the individual may have certain rights and that he may do certain things without interference by the State so long as public order and the public interest prevail, still in theory sovereignty carries with it plenary power to exclude all

anterior rights, to exercise absolute control over all subjects, and to decree what shall and shall not be done. In final analysis, once the sovereign State is set up by individuals who up to that moment may have been in the possession of real freedom, the State and not the individual can in fact determine what rights and liberties shall belong to, or at least be exercised by any individual. Carried to extremes, State sovereignty may abolish individual liberty; it may make rights meaningless. And exteriorally, the State can be made subject to no limitations upon the exercise of its sovereignty in favor of its own inhabitants contrary to its own will, save by the use of force.

The concept of State sovereignty involves a denial of the existence of any superior power on earth among men within its own jurisdiction. Here is where religious liberty raises a third dimension. Religion implies a belief in a God whose supreme power controls the universe and mankind, regardless of the will of man or his institutions. This posits two sovereignties, therefore. If man professes belief in a supreme being with power on earth he denies automatically the sovereignty of the State. If on the other hand he believes in the absolute sovereignty of the State over all persons and things within the State, he denies by so much the sovereignty of God. To a State that is particularly sensitive in matters of sovereignty, particularly in a State which is not Christian or theistic, religious liberty may imply insubordination and the bringing in of a loyalty alien to that of the State. This can be made to appear to be the case especially where religious liberty entails membership in a powerful Church organization which may have its center in a foreign land.

Religious liberty is accompanied in many instances by membership in a religious organization. This organization may or may not be incorporated by law, or be recognized or established by the State. In any event, the religious organization naturally inclines to pay allegiance first of all to the spiritual Being which its adherents worship. Thus it may become, in attitude at least, an independently inclined body within the framework of the State, thus bringing into possibility once again a clash with State sovereignty. Historically, two things have always tended to emerge from this. Either the religious body agitates for rights and independence within the body politic. Or it seeks to gain control of the machinery of government, and become in fact or in substance an established Church with preferential or monopolistic prerogatives over other religious communions. The histories of Judaism, Christianity, and Islam are replete with examples.

There are two other angles to the relationship between individual liberty, State sovereignty, and religious organizationalism which ought to be seen if situations are to be dealt with realistically.

In addition to fostering the growth of religious bodies and independent attitudes within the body politic, religious liberty may involve the teaching of doctrines that run counter to policies adopted by the State. Various religions teach the brotherhood of man and the eventual unity of all nations, whereas states seek to perpetuate the separation of nations and races. Religions endeavor to minimize the barriers between peoples, to build up an international fellowship and communion, whereas the State attaches great importance to boundaries and the preservation of differences. In some cases religions seek to propagate beliefs that are diametrically opposed to established institutions of the State. In Moslem lands Christian religions contradict the teachings of the State religion of Islam. In Japan Christianity questions the State Shintoism and the divinity of the Emperor. In countries where the Catholic Church is the established Church of the State, Protestants dispute the omnipotence of the Papacy, as well as many of the teachings of the Church, and seek to undermine the preferential rights which it enjoys.

Religious liberty brings in its train another situation. Various religious creeds maintain that the beliefs which they uphold represent the truth to such an extent that the individual must embrace the creed entire, foregoing his individual religious liberty, or he can have no place in the body which accepts it. Allowed to project their dogmas to their logical end, many religious faiths would ultimately deny religious liberty itself and repudiate its values.

The deduction which must be drawn from these several tendencies is that from the point of view of the State, religious liberty may not always appear to be an unmitigated good. Although religion has been criticized by some as an "opiate of the people," religious liberty can become a source of contention and disturbance within the body politic. It can become a medium through which the authority and the laws of the State are brought into question, or even controverted. Instead of being a means by which the people will be satisfied, religious liberty - seen from the eyes of some States - may stir up an otherwise docile population, complicating the problem of governance and requiring the State to adopt an entirely new social order against its own desire.

These tendencies and inferences will not be an insurmountable argument against religious liberty for those who are convinced of its values. Nevertheless, if we are to deal with the problem in a way which will provide liberty on the one hand, and amicable disposition on the part of States on the other hand, we must at least be aware of the reasons which lead some States to oppose the granting of religious liberty by their own volition, or to entering into international compacts requiring them to guarantee it. We are dealing with two volatile substances in individual liberty and State sovereignty. From all appearances most men want both some degree of individual liberty, and at the same time social order and law which government can provide. Therefore, in seeking to get a concept of religious liberty introduced into international relations we must be careful that we do not weight the scales too heavily on one side or fail to take proper account of the functions which States are expected to discharge. We must recognize that various religious bodies that clamor for liberty when they are in the minority, endeavor to obtain dominance when the numbers of their adherents enable them to gain ascendancy through influence upon government or establishment as the officially approved faith.

In the liberal State these issues ordinarily find some acceptable solution through compromise on the part of all -- individuals, State, and religious organizations. But the recent incidents concerning Jehovah's Witnesses in the United States show that even in such a liberal State reconciliation is not complete or entirely satisfactory when one party goes to extremes in its position. In a State where there is a hypersensitive nationalism, or an established religion, a purely domestic solution may not be feasible, especially when it comes to the introduction of other faiths, or the propagation of them by foreigners or persons in a religious minority. This is where there is a place for international arrangements.

Early Development of Concept of Religious Liberty in International Law

There has been a close association between religious liberty and international law since the beginning of the 17th century. This may have been mere happenstance to a certain extent, but not entirely. For the same ideas and forces which gave rise to the one rather naturally stimulated the development of the other.

The birth of international law is ordinarily placed in the early half of the 17th century. And Hugo Grotius, who is also known as an eminent theologian, is frequently regarded as the "Father of International Law" because of his epochal treatise on The Laws of War and Peace, published in 1625.

It was during these same first fifty years of the 17th century that the issue of religious liberty was being fought out at arms among the States of Western Europe. The Holy Roman Empire and the Inquisition in the Low Countries were at length brought to their denouement by the Thirty Years War which ended the long cycle of Wars of Religion on the Continent with the Peace of Westphalia. The absolute power of the Roman Church was broken in Germany. Religious liberty was enshrined in treaty form in the Treaties of Munster and Osnabruck, with Sweden, France, and even Spain guaranteeing freedom of conscience in the German States. That the Papacy was aware of the meaning of this was made abundantly clear in a vehement protest which it lodged with the Governments of France and Spain. During these same years, as well as during the fifty that followed, England too was going through her civil wars and Puritan Revolts for the establishment of individual religious liberty and the abolition of "Popery" from the Crown.

Grotius and other classical writers on the law of nations were deeply religious men. Their utilization of natural law as a foundation for international law did much to forge a connection between law and religion which lasted until the 19th century when another development in international relations provided a new basis for concern on the part of the law with religious liberty.

When international law was first accepted by the community of states the members of that society were composed of the Christian States of Western Europe where, as remarked before, the issue of religious liberty was being thrashed out in the 17th century. Russia came in presently and accepted the law of nations. But the Ottoman Empire and the independent States of Asia, Africa, and the Americas were not recognized as being a part of the community until the latter years of the 18th or the early part of the 19th centuries. When these extra-European countries came into the society of nations the missionary movement was getting under way. Governments were beginning to take more of an interest in the welfare and activities of their nationals abroad, and so incidents relating to religious liberty began to assume an international interest. Moreover, the French Government had undertaken to act as the defender of the faith for the Catholic Church wherever its missions were located in distant lands, and Russia had become the active champion of the cause of Christians in the Ottoman Empire. Hence the stage was set for the European Governments, and that of the United States due to the agitation of missionary organizations in the Union, to intervene diplomatically and otherwise in the internal affairs of many of the Eastern European, Asiatic, and Near Eastern regions during the 19th and early 20th centuries for the guaranteeing and securing of religious liberty. It so happened that these developments of the 18th and 19th centuries coincided also with the spread of the equalitarian and rights-of-man principles of the French and American Revolutions, and the liberalism of the 19th century, both of which were favorable to religious liberty, and therefore to its being extended along with the republican and liberal institutions of the times.

The concatenation of all these circumstances was that a favorable atmosphere was created for the development of a concept of religious liberty in international law. At any rate, there was a coeval development of both international law and religious liberty. By national law, or by international arrangements, religious liberty was introduced in one form or another into the social structure of nearly every State in the world during the 19th century. Formal adoption, however, did not always entail hearty fulfillment.

Views of Writers on International Law

Of the forty-seven writers of the more important general treatises on international law since the time of Grotius, at least thirty refer to religious liberty in one way or another. Generally speaking the subject is referred to in one or more of three connections: (1) the authority of the State to regulate religions within its jurisdiction; (2) treaties providing for religious liberty; (3) intervention to protect religious minorities or to stop persecutions.

There is a good deal of diversity of approach and of conclusions in these writings. Indeed, the opinions expressed are so diversified it is difficult to draw any viable conclusions. There are certain trends, however, which can be noted

The writers since Grotius are often classified into three schools, depending upon the position which they take on the source of international law: (1) the Naturalists, who believe that international law is derived from the law of nature; (2) the Positivists, who maintain that the law results entirely from the positive acts and agreements of States; and (3) the Eclectics, who hold that there are certain fundamental precepts of law resulting from the nature of things that are common to all States, as well as a large body of principles based on positive acts. The naturalist school, which died out for the most part by the middle of the 18th century believed that the State was under obligation to nurture religion in as much as men and States were supposed to be existing in a state of nature into which God had imparted certain characteristics and purposes. The positivists, on the other hand, together with the eclectics, who came to predominating influence after 1750, recognized the sovereign jurisdiction of the State over all persons and activities within its boundaries, and inclined to the view that unless the States entered into treaty arrangements guaranteeing religious liberty, there was no obligation under international law to accord it. -"Inclined to the view," for few writers are exactly specific on this point. One has to infer much from their discussions of jurisdiction and of treaty law, with references to the treaties providing for religious liberty as the guide.

On the question of what attitude the State should take toward individual freedom of religious expression where it has already established a given Church, one can observe a good deal of subjective thinking, depending on the writer's own religious affiliation, and the attitudes current in his country at the time of writing.

Many of the writers refer to some of the treaties providing for religious liberty without drawing any conclusions therefrom, and a goodly number are in agreement that intervention is justified where a State grossly maltreats a religious minority or persecutes foreigners because of their beliefs.

Vattel

Emerich Vattel, whose Le Droit des Gens was published in 1758, believed with Plato and Aristotle that "religion is of extreme importance to the peace and welfare of society," and that "liberty of conscience is a natural and inviolable right." While acknowledging that the State may prescribe the exterior forms of worship, and establish a church if it sees fit, he affirms that the State must allow the individual to believe and to worship in private as he wishes. Toleration of all faiths, on the model of Switzerland, he believes to be the best policy for the State, especially where there are deep-seated differences regarding religion. Rather than champion absolute religious liberty, however, Vattel

argues that if the State establishes a Church, dissenters who cannot be satisfied with private worship should leave the country rather than cause public disturbances. This places the premium upon public tranquility rather than upon the well-being of the individual. And the argument would appeal to those who believe in an established Church, and to Moslems who resent the intrusion of Christian propagandists.

Regardless of what the religious situation may be within any country, Vattel believes the State must have ultimate authority over ministers and ecclesiastics, else the systems of Boniface VIIIth and Gregory VIIIth will arise, subordinating the State to a religious hierarchy and producing chaos in politics, law, and justice. "If a State cannot finally determine everything relating to religion, the nation is not free, and the prince is but half a sovereign."

Vattel opposed forceful proselytising, or interference under ordinary circumstance with the internal religious affairs of another nation. But, he added, "it is an office of humanity to labor, by mild and lawful means, to persuade a nation to receive a religion which we believe to be the only one that is true and salutary." A moderate degree of missionary enterprise he believed to be "conformable to the attention which every nation owes to the perfection and happiness of others." But, he cautioned, "Kindle in all hearts the ardent zeal of the missionaries, and you will see all Europe inundated with Lamas, Bonzes, and Der-vishes, while monks of all kinds will overrun Asia and Africa. Protestant ministers will crowd into Spain and Italy, in defiance of the Inquisition, while the Jesuits will spread themselves among the Protestants in order to bring them back into the pale of the Church." - Interesting thoughts to say the least!

On the question of intervention for the protection of religious minorities against persecution in another State Vattel writes: "When a religion is persecuted in one country foreign nations who profess it may intercede for their brethren: but this is all they can lawfully do, unless the persecution be carried to an intolerable excess: then, indeed, it becomes a case of manifest tyranny, in opposition to which all nations are allowed to assist an unhappy people. A regard to their own safety may also authorize them to undertake the defence of the persecuted sufferers. All distinctions of states and nations are to be disregarded when there is question of forming a coalition against a set of madmen who would exterminate all those that do not implicitly receive their doctrines." How true an observation for the present day!

Martens

Georg Friedrich Martens, the first notable Russian writer, holds that all matters of religion within a State are governed by law or treaty, and that the individual must depend "upon the will of each State, guided by principles of a wise tolerance." Foreign powers have no right to demand religious liberty for their subjects, nor any right to intervene in order to secure it or to protect minorities, unless such a right is provided for by treaty. Martens notes, however, that as early as the year 1789, in which he writes, that nearly all treaties of commerce between States having different religions contain articles for reciprocal toleration.

Wheaton

Henry Wheaton, the early American jurist and diplomat, has been frequently quoted for his views on intervention in behalf of religious interests. Writing with regard to the actions of the European Powers in freeing Greece from Turkish

oppression in 1827, he said: "The interference of the Christian Powers of Europe in favor of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorising such an interference not only where the interests and safety of other Powers are immediately affected by the internal transactions of a particular State, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government."

Although some later writers have taken the opposite position, condemning intervention on humanitarian grounds, often because this was used as a cloak to cover vested political interests, the practice of States during the past century has borne out Wheaton's exposition.

Phillimore

Sir Robert Phillimore's Commentaries upon International Law long exercised an influence upon legal thought and Foreign Office attitudes in England, because of their intrinsic worth, and because of the author's position as one of the Legal Officers of the Crown. The Commentaries contain several chapters on the State and religion, the international relations of the Papacy, and intervention on account of religious persecution.

Phillimore is the only author of recent times who has come out positively favoring intervention for the security of religious liberty. He says: "The practice of Intervention by one Christian State on behalf of the subjects of another Christian State upon the ground of religion, dates from the period of the Reformation. The abstract principle...has derived force from being embodied in various important Treaties. . .It appears, therefore, that Intervention...has as a matter of fact, in certain circumstances been practised, and cannot be said, in the abstract, to be a violation of International Law." But he admits that it should be restricted to extreme cases "of a positive persecution inflicted avowedly upon the ground of religious belief." Against infidel States, Phillimore feels that there is an even more secure right of intervention to stop or prevent persecutions.

Hall

Professor William Hall of Oxford, and Professor Lucius Oppenheim of Cambridge, have likewise had far-reaching influence upon international lawyers, exceeding perhaps that of Sir Robert Phillimore. Their influence has been a continuing one due to periodic revisions of their works during recent years.

Hall feels that religious oppression short of cruelty which would rank as tyranny is no longer recognized as an independent ground of intervention. Condemning various 19th century interventions in the Ottoman Empire and elsewhere, which were alleged to have been for the protection of religious minorities, Hall says that the humanitarian aspect was used "to excuse the commission of acts in other respects grossly immoral." Emphasizing the right of each State to put its own internal affairs in order, Hall says, "In giving their sanction to interventions of the kind in question jurists have imparted an aspect of legality to a species of intervention which makes a deep inroad into one of the cardinal doctrines of international law." Intervention, he maintains, can be excused only because of purity of motives and extraordinary circumstances.

Oppenheim

Writing some twenty years after Hall penned his first edition, Oppenheim also takes the positivist approach, though is somewhat more flexible in his attitude concerning intervention. He asserts that matters such as religious liberty lie within the province of each State to regulate. International law does not guarantee, he writes, any "rights of man," including religious liberty. Nevertheless, Oppenheim does take account of the fact, without drawing any deductions therefrom, that by treaties and agreements the Powers "have borne out the Christian background of international law by requiring certain States to accord religious liberty." Oppenheim does not doubt that the Powers would intervene if a State treated its own subjects with cruelty and inhumanity.

Liszt

Little attention is paid to the matter under consideration by the German writers on international law. Friedrich von Liszt, one of the best, contents himself with the observation that the free exercise of religion is guaranteed to the inhabitants of civilized States by municipal law, and although he speaks of the arrangements with the Balkan States drawn up at the Congress of Berlin in 1878, and the Congo Agreement of 1885, he doubts whether there is need of a special, general international convention assuring religious liberty in every State. One wonders whether Liszt would have changed his view had he been living from 1933 on.

Moore

John Basset Moore's Digest of International Law has two sections devoted to the subject, from the angle of United States practice. Although Judge Moore refrains from offering any opinion on his own part as to rights and duties respecting religious liberty, the gist of the state papers quoted serves to indicate that the United States Government has for a century had a sympathetic attitude toward persons and groups who may suffer discrimination or persecution abroad on account of religious beliefs. It appears that the United States will remonstrate where liberty is denied or where there is extensive persecution, but that it will be slow to take any step which might be viewed as formal intervention.

Wilson

Professor George Grafton Wilson, one of the most positivistic of contemporary American writers, notes without comment that there have been treaties providing for religious liberty and protection of religious minorities. He asserts that non-intervention is a general rule of international law, although he mentions without further remark that intervention for humanitarian and religious purposes has taken place during the last century in South-Eastern Europe.

Hyde

Charles Cheyney Hyde, Professor of International Law at Columbia University, and formerly Legal Adviser to the Department of State, has a considerable analysis of the problem in his International Law Chiefly as Interpreted and Applied by the United States. He observes that the State can exercise a broad control over religion and worship within its territory, but, he adds, "so widespread has become the habit of tolerance (by treaties and local laws) that any attempt to abridge completely the freedom of worship of a resident alien would now be regarded as contrary to the practice of enlightened states." He does not say that such an abridgment would be contrary to international law. He recognizes that the establishment of any one Church may incline the sovereign to restrain the liberty of worship and the free proselytizing of non-adherents.

Reviewing the practice of the United States, Hyde calls attention to the fact that the United States demands equal religious freedom for its nationals abroad. It is interested in the cause of religious liberty, and disposed to express suggestions in a friendly manner, having due regard to the sensibilities of the native peoples. It will not plead the cause of aliens in foreign lands except where persecution arises that is injurious to the rights of the nation or its citizens. It has, on the other hand, demanded by treaty that Christians in China be not persecuted, and it has protested the treatment of Jews in Roumania, and of Christians in the Ottoman Empire. In Turkey the United States took advantage of the capitulations to deny the right of the government to restrict Christian missionary activities, close places of worship, censor religious literature, or to persecute Turkish subjects connected with missionary enterprises - all of this prior to the Treaty of Lausanne in 1923.

Hackworth

Mr Green Hackworth, the present Legal Adviser to the Department of State, is the author of the latest general treatise on international law. His Digest of International Law is intended to cover the positions taken by the United States Government since 1908. No personal opinion is expressed by the author, but the selections quoted from the files of the Department indicate a lively concern on the part of the United States Government for religious liberty abroad. It is emphasized, however, that the United States Government will not interpose with another government over a question of religious liberty unless American nationals are directly affected.

Summary of Writers

There is agreement among the writers that have been consulted that control of religious liberty belongs in the first instance within the province of the State. There is difference of opinion, however, whether religious liberty is an inviolable right. Most of the writers, where they touch upon this aspect of the subject at all, admit that a State may establish a particular communion with special rights and privileges if it sees fit to do so.

Quite a number of the writers refer to treaties providing for religious liberty on a reciprocal basis for the nationals of the treaty-making States in each other's territory. Some mention the treaties with China and other countries opening the door to Christian missionaries, and some speak of the agreements with the Ottoman Empire and the Balkan States calling for religious liberty in those countries on a non-reciprocal basis. But no writer asserts that there is a generally accepted postulate of international law that every State is under legal obligation to accord religious liberty within its jurisdiction. The writers are loathe to suggest that there is such a principle applicable to any particular region, or to territories that are transferred from one nation to another. However, the reference to the treaties would appear to indicate, and one can hardly do more than use this conditional expression, that the signature of treaties guaranteeing religious liberty is approved by the jurists. No writer has been found who disapproves of this practice. Various authors condemn some of the interventions of the past on the ground that mixed motives were present, and that meddling in the internal affairs of certain Eastern States to protect minorities was really a disguise for more imperialistic motives. Nevertheless, the writers agree that if a State persecutes its inhabitants in an inhumane and tyrannical manner on account of their religion others may be justified in trying to put an end to such an uncivilized practice.

THE PRACTICE OF STATES

The surest revelation of the place of religious liberty in international law is to be found in the actual practice of States in their relations with one another. What they regard as international law, and as the requirements of that law, can be discovered by reference to the treaties which have been concluded, and to the state papers and actions which have exemplified their positions when religious liberty has been denied.

Provision for Liberty by Domestic Law

An examination of the written constitutions in force before the outbreak of the present war shows that in the majority of cases some provision was inserted into these fundamental laws, which, if properly implemented by executives or judicial action, should have insured some degree of religious liberty in most States. Many States gave some designated communion a preferred standing, or official recognition. But even most of these avowed, nevertheless, that the individual should enjoy freedom of conscience or more.

The Survey being conducted by the Committee on Religious Liberty on the situation in each country has revealed that in many lands there is a divergence from the letter of the law in the day to day conduct of public affairs. The Survey has demonstrated that ways and means need to be found of giving the basic principles more effective force in daily affairs.

The point which is being driven at here is not, however, the discrepancy which has just been mentioned, but the fact that as evidenced by their own laws, a majority of States have assumed for themselves the idea that the State has a responsibility for seeing that the individual is accorded freedom of conscience and the right to worship, at least privately, as he desires. There are exceptions.

When one goes beyond these minimal aspects of religious liberty the numbers of guarantees, as of the right to public worship, the absolute equality of communions, the guarantee of non-discrimination or non-disability on account of religious beliefs, commence to fall off rapidly. Indeed, it appears that the majority of States grant by law preferences of some kind to some religion, which means of course that they are not prepared to accord religious liberty in the absolute sense. Great Britain falls into this class by the Establishment Act which debars a Catholic from becoming King, or the Catholic Church from enjoying full equality with the Church of England. And in the United States there has been what has amounted to an unwritten constitutional rule to the same effect. However, it can be seen that by virtue of the practice of the majority of States of writing provisions for some degree of religious liberty into their constitutional law, a basis has been laid for insisting that States which have not guaranteed such liberty, or which have persecuted religious minorities because of their beliefs, must enter into treaty arrangements guaranteeing religious liberty, or desist from their inequitable practices.

Demand that Non-Granting States Assure
Religious Liberty

The files of diplomatic correspondence contain many notes setting forth the requests and demands of European States and the United States of America that countries failing to make adequate provision for religious liberty within their own domain do so by adding to their own laws or by entering into treaty commitments.

Illustrations include: (1) the insistence of the Western Powers in their first and second treaty settlements with China in 1842-44, and 1858-60, that that country accept clauses in the treaties for religious toleration and missionary activity; (2) similar insistence with Japan prior to the adoption of the Constitution of 1889; (3) the demands of the European Powers from 1856 on that the Ottoman Empire grant religious freedom to the Christians in its midst; (4) the requirement adopted by the European Powers at the Congress of Berlin in 1878 that recognition of the independence of the Balkan States be made conditional upon those States expressly incorporating provisions for religious liberty in their fundamental laws, as well as entering into a multilateral agreement with the Powers for the same purpose; and (5) the insistence by the Big Four at Paris in 1919 that Poland, Austria, Bulgaria, Czechoslovakia, Greece, Hungary, Roumania, and Turkey enter into treaty arrangements with the Great Powers pledging themselves to "recognize as fundamental laws" in each of their countries certain definite stipulations for religious liberty, and to agree that "no law or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them."

These are strong precedents. They go far in showing that the Great Powers of Europe, the British Commonwealth of Nations, the United States, and even Japan in 1919, believe that there is a minimum standard of religious liberty which a State must accord to all within its midst. This is not to say that these large States have felt equally that international law per se contains a principle that every State is under obligation to the community as a whole to adopt laws for itself guaranteeing religious liberty. The debates which took place at Paris in 1919 on President Wilson's proposal to insert a toleration article into the Covenant of the League of Nations throw light upon that proposition, at least as of the period preceding the Second World War. But practice for the past century indicates that up to the 1920's, at any rate, there was a mounting and concerted agreement that countries which had failed to grant a minimum of religious liberty should henceforth be required to do so, that countries where transfers of populations were being effected should be called upon to give guarantees, and that countries where there were delicate minority problems should also be made to assure those minorities certain elementary rights for religious liberty.

The second of President Roosevelt's Four Freedoms, enunciated in his speech of January 6, 1941, - "freedom of every person to worship God in his own way - everywhere in the world" - points the way to the formulation of a new insistence that at the end of the present World War the religious persecutions practiced by the Axis Nations shall be stamped out and that guarantees be required that in all nations freedom of religion shall be guaranteed more effectively than heretofore.

Protests Against Discriminations and Persecutions

The files of the United States Department of State, as also doubtless those of other Foreign Offices, contain innumerable complaints from religious organizations at home and abroad about incidents involving discriminations and persecutions.

As might be expected, because of the varied character of the actions complained of, the measures taken by the principal Powers have varied a good deal. Some governments have been more ready to intervene diplomatically than others.

Generally speaking, the United States has not been disposed to intercede with another Government over a matter of religious liberty unless (1) Americans are being discriminated against; (2) Americans are being denied a treaty right; (3) the action of the foreign Government or its officials violates some law of the

State, or is of a most unjust, flagrant nature. Ordinarily the United States Government will not be party to a protest or intervention against a foreign State's treatment of its own subjects. But there have been exceptions to this (1) where treaties to which the United States is a party stipulate that the foreign nation shall not discriminate against natives joining the Christian Church or shall not subject them to civic disabilities because of their religious views, and (2) where particularly barbarous practices have developed. Examples of the first type of exception are to be found in protests to China, under the terms of the 1860 and 1903 treaties, and to the Turkish Government, prior to 1923, under the terms of the capitulations.

In the second type of exceptional action the protests of Secretary of State Hay to the Government of Roumania in 1902 over the persecution of the Jews stand at the extremity of United States' interposition. Secretary Hay wrote to the American Minister to Roumania, July 17, 1902:-

"This Government cannot be a tacit party to such an international wrong. It is constrained to protest against the treatment to which the Jews of Roumania are subjected, not alone because it has unimpeachable ground to remonstrate against the resultant injury to itself (i.e. being forced to receive persecuted emigres), but in the name of humanity. The United States may not authoritatively appeal to the stipulations of the Treaty of Berlin, to which it was not and cannot become a signatory, but it does earnestly appeal to the principles consigned therein because they are principles of international law and eternal justice, advocating the broad toleration which that solemn compact enjoins and standing ready to lend its moral support to the fulfillment thereof by its cosignatories, for the act of Roumania itself has effectively joined the United States to them as an interested party in this regard."

The policy followed by the United States on other occasions is best expressed in excerpts from two other notes. Writing in 1858 Secretary of State Cass said:

"There are cruelties and outrages of such a revolting nature that it is natural, laudable, indeed, that when they occur, they should meet with general condemnation. But this duty to 'outraged humanity' should be left to the actions of individuals, and to the expression of public opinion, for it is manifest that if one government assumes the power to judge and censure the proceedings of another or the laws it recognizes, in cases which do not affect their own interests, or the rights of their citizens, the intercourse of nations will soon become a system of crimination and recrimination hostile to friendly communication. For, the principle of interference being once admitted, its application may be indefinitely extended, depending for its exercise on the opinion which each country may form of the civil polity of another, and of its practical operation."

In the absence of an over-all international organization with power to judge the actions of nations, or of a clearly understood and generally accepted rule of international law that each nation is under obligation to accord the fullest liberty of conscience to all inhabitants and to refrain from persecuting any because of their religious beliefs, there is much to commend the stand taken by Secretary Cass.

Writing some years later, Mr F.W.Seward, the Acting Secretary of State, held that "as a rule our representatives abroad are permitted to extend the protection of the United States only to native-born or naturalized citizens thereof, but the sympathy of the United States for all oppressed peoples in foreign countries has been freely manifested in all cases where it could be done in accordance with the spirit of international courtesy and diplomatic usage."

Where there is no treaty and yet the United States Government feels it desirable to take some action in behalf of either its own nationals or of the subjects of a foreign state, its procedure is "necessarily confined to equitable representation," as expressed by Mr. Rockhill. This same position was reaffirmed in 1911 in connection with a Venezuelan law of "ecclesiastical patronage to foreign missionary societies." The Department of State instructed the Minister to Venezuela as follows:

"While it has ever been the policy of this Government not to interfere with the internal regulations of foreign governments, more especially in questions of religion, this Government, practising as it does at home the largest principles of freedom of thought and belief, is naturally desirous to see its citizens enjoy in other countries a reasonable freedom from restrictions or disabilities imposed by reason of religious faith. While recognizing that the determination of the internal policy of a nation is an attribute of its sovereignty, the United States has not hesitated to express this desire in considerate and friendly ways on appropriate occasions which have arisen at various times in different countries. It should be observed, however, that such representations have never been put upon a basis of strict right, for it surely will be appreciated that this Government may not, as a matter of right, demand that another government shall grant to religionists of American nationality in the territory of that government the degree of freedom or privilege which it might desire to see extended to them. This consideration is particularly applicable to the present situation, for the reason that there is at present no treaty provision in effect between the Government of the United States and that of Venezuela prescribing the rights as to religious liberty to be enjoyed by the citizens of one country in the territory of the other. Accordingly it must be observed that with all desire to do what it properly may to assist the American missionaries who have addressed the protest to you, in view of this Government's practice and policy as outlined above, the Department's opportunity for affirmative action in the matter is necessarily somewhat limited."

The latest expression of the policy of the United States Government which has been published is that with respect to the religious situation in Mexico in 1938, when Mr. Welles wrote:

"There is, I feel, no need to assure you that the actual grant of religious liberty in every country of the world is not only the wish of President Roosevelt, but with him, as with his predecessors, has been a definite, publicly stated and traditional policy of our Government. Nevertheless, it should also be borne in mind that in the same degree that we would refuse to permit any interference by foreigners in our own domestic concerns, it is not appropriate or proper that we should seek to determine or

influence the circumstances of domestic problems in a foreign country by taking any official action with relation thereto, however peaceable, friendly or well intentioned.

In this connection I would call your attention to Article 8 of the multilateral convention signed at Montevideo on December 26, 1933, our ratification of which was proclaimed by the President on January 18, 1935. That Article reads: 'No State has the right to intervene in the internal or external affairs of another,' and is in force as between the United States and Mexico.

It will, therefore, be clear to you that there are certain limitations binding every government in its proper relations to other governments, to exceed which would defeat the very purposes sought. I can assure you that within those limits the President has championed, and will continue to champion, the principles of the freedom of worship and education for all nationals in every country of the world."

The personal attitude of President Roosevelt was fully expressed in a speech which he delivered at San Diego on October 2, 1935, in which he said:-

"...In the United States we regard it as axiomatic that every person shall enjoy the free exercise of his religion according to the dictates of his conscience. Our flag for a century and a half has been the symbol of the principles of liberty of conscience, of religious freedom and equality before the law; and these concepts are deeply ingrained in our national character.

It is true that other Nations may, as they do, enforce contrary rules of conscience and conduct. It is true that policies may be pursued under flags other than our own but those policies are beyond our jurisdiction. Yet in our inner individual lives we can never be indifferent, and we assert for ourselves complete freedom to embrace, to profess and to observe the principles for which our flag has so long been the lofty symbol. As it was so well said by James Madison, over a century ago: 'We hold it for a fundamental and inalienable truth that religion and the manner of discharging it can be directed only by reason and conviction, not by force or violence.' "

TREATIES CALLING FOR RELIGIOUS LIBERTY

General Observations

Religious liberty was first provided for in an international treaty in the treaties of Westphalia in 1648. Between that date and the beginning of the 19th century, when treaties were being made some of which have continued in force to present times, only a small number were concluded which embodied articles

guaranteeing religious liberty. (1)

As our concern here is for the international law of the contemporary period, attention will be directed to the treaties which have been in force during the latter half of the 19th century and during the present century. These are sufficiently numerous to show what States have been willing to cover by way of treaty arrangements.

Religious liberty provisions have been incorporated into five kinds of treaties. The contents have varied from type to type, as the different kinds of treaties deal with varying sorts of international relationships. And within each classification of treaties, the individual clauses vary considerably, depending upon political relationships, the policies of the signatory States, and other circumstances.

The five kinds of treaties in which religious liberty clauses will be found are: (1) Treaties of Amity, Commerce, and Navigation, between two parties; (2) Treaties of Peace, and cession of territory, both bilateral and multipartite; (3) multilateral conventions or arrangements dealing with colonial possessions and mandates; (4) multilateral conventions for the recognition of new States; and (5) Minorities Treaties, usually between a sizeable group of Powers.

Although the list of treaties containing religious liberty articles is extensive, not all treaties within each of the five types listed include such articles. Some countries are more inclined than others to insist upon such articles, and of these the United States and Great Britain are in the forefront. But not all treaties of any given type which even the United States negotiates contain a religious liberty article. Treaty making is usually a bargaining process in which there is some give and take by each party. Sometimes the larger State, or a group of Great Powers, can exert pressure upon a weaker or defeated State to sign a particular form of article against its wishes. But ordinarily religious liberty articles are not the object of much contention in treaty negotiations.

In order to clarify the treaty clauses as much as possible a chart has been drawn up listing a number of treaties of the different types, with check marks showing the aspects of religious liberty set forth in each treaty. The chart covers treaties that have been in force during the last one hundred years, with states that still are regarded as having an existence. All of the United States treaties have

(1) The more important treaties of the early period include:

- 1648 - France, Sweden, and the German States, guaranteeing religious liberty within the principalities.
- 1648 - Spain and Holland, reciprocal toleration for religious beliefs of subjects in each other's territory
- 1654 - Britain and Portugal, same
- 1660 - Poland and Sweden. Poland to accord Protestants same rights as Catholics.
- 1686 - Russia and Poland, reciprocal toleration.
- 1742 - Prussia-Poland. Prussia to respect rights of Catholics in Silesia.
- 1763 - Britain-France. Britain recognize rights of Catholics in Quebec.
- 1785 - Austria-Russia. Reciprocal toleration
- 1809 - Russia-Sweden. Russia promises religious liberty to inhabitants of ceded territories.

been included. Practically all of the multilateral conventions and arrangements have been catalogued. But the bilateral treaties to which European and other States have been parties inter se, have been only partially inventoried, and those which are listed have been taken merely by way of example. However, the list is sufficiently comprehensive to give a fair idea of what the different types of treaties have provided. And enough different formulae are embraced to afford a basis on which to work in planning post-war arrangements.

Treaties of Amity and Commerce

Treaties of Amity, Commerce, and Navigation usually aim to lay down the rights, privileges, and duties which the nationals of one country shall have in the territory of another. Consequently, the typical clause relating to religious liberty found in this type of treaty provides that nationals of one party in the territory of the other shall enjoy liberty of conscience, the right to private religious beliefs without interference so long as local order and morality are not disturbed. In addition, other clauses in these treaties often guarantee security of person and property to the foreigners in accordance with law.

The treaties which were concluded with Latin American countries during the early period of their statehood provide almost uniformly for liberty of conscience and belief. Later treaties with these same countries, and also with European and Asiatic countries, add the act of worship. A few of the 19th century treaties, particularly with China, together with the group of treaties concluded by the United States after 1923, authorize public worship. Only one or two of all the treaties surveyed failed to insert a reservation safeguarding the maintenance of order and respect for local moral customs.

Treaties with China, with Siam, and the post-1923 treaties of the United States, stand alone in specifically mentioning religious, philanthropic and educational work, and thereby authorizing them. Most treaties allow the employment of agents, but only the treaties with China, and one treaty with the Congo Free State mention missionaries as such.

Only in the treaties with China is there a provision requiring one of the parties to guarantee religious liberty to its own subjects within its own territory. This clause has long irked the Chinese Government and formed one of the bases of complaint that China has been forced to uphold "unequal treaties," thereby depriving China of full equality with other States. Desirable as some such clause may seem to be, theoretically speaking, to missionary interests, it doubtless should be abandoned in its present form when the Chinese treaties are revised. If the idea is to be retained it should operate for both treaty parties.

Treaties of Peace and Cession

The treaties of peace and of cession of territory are usually primarily concerned with securing a guarantee from the defeated State, or the State receiving territory, that the inhabitants thereof shall be given religious liberty. The right of belief and worship, security of person and property, non-discrimination and non-disability in the enjoyment of civic rights, opportunity for educational advancement: - these are the things most frequently sought in treaties of peace and of cession. These treaties are only secondarily concerned with religious liberty for the foreigner. In this respect they differ from the commercial treaties. And they tie in with the arrangements relating to colonial areas, the recognition of new States, and the minorities treaties.

Treaties for Colonial and Mandate Areas

The third class of treaties containing religious liberty provisions includes the General Act Relating to African Possessions, signed at Berlin in 1885, the revision of that Act at Paris in 1919 (with the United States and Japan among the parties to this latter instrument), the Mandate Agreements, and the treaties between the United States and the Mandatory Powers giving United States nationals the same rights in the mandated areas as nationals of States Members of the League of Nations.

These treaties cover a broad span of component elements of religious liberty, securing benefits both to foreigners and to natives. In particular they provide for toleration, public worship, the right to teach, preach and engage in social and charitable work, the right to travel and reside in the interior, to hold property for religious purposes. Special mention is made of missionaries, who shall enjoy the right to enter the colonial and mandated areas for the purpose of carrying on Christian work.

All of these colonial-mandate area treaties have the merit, not shared by the bilateral commercial treaties, of making the guarantee of religious liberty an international obligation. The General Act of Berlin made fulfillment an obligation to the concert of Great Powers, as did the 1919 revision. The Mandates make the Mandatory Power responsible to the League of Nations for the proper execution of the promise to accord religious liberty in the mandated areas. Moreover the Mandate Terms give the Council of the League of Nations the right to intervene on its own initiative if religious liberty is denied or abridged. And these Terms also give the Permanent Court of International Justice jurisdiction over disputes concerning the interpretation of the treaty obligations. These provisions represent long steps forward in regularizing intervention, when warranted, and in removing disputes between the treaty Powers (concerning the observance of religious liberty) from the realm of power politics. For the accordance or denial of religious liberty is a question of fact that should be determined by impartial fact-finding agencies. And the delinquent party should be brought to changing its practice upon the basis of facts and law, without any inter-mixture of ulterior political motives or power politics.

Minorities Treaties

Special concern for the religious wellbeing of the inhabitants of Eastern Europe has been manifested by the Great Powers ever since 1830. In 1856 the Powers required Turkey to sign a treaty pledging religious toleration, freedom of worship, and non-interference with Christian believers within the Ottoman Empire so long as their conduct was orderly and peaceable. This same concern was given new expression at the Congress of Berlin in 1878 when the Powers were faced with recognizing the independence of Roumania, Serbia, Montenegro, and Bulgaria. The Concert required each of these new countries to enter into an agreement with the Concert contracting to insert into their respective constitutions and laws provisions guaranteeing religious liberty. And the Powers made the signature of these agreements a condition precedent to the recognition of the independence of the new States. These arrangements called for the same things which had been insisted on with Turkey, plus a stipulation for non-discrimination and non-disability regarding civic and political rights. As in the case of the colonial arrangements, these agreements had the advantage of making the guaranteeing State responsible to the community at large.

The 1919-23 Minorities Treaties were utilized in a somewhat similar way at the end of the last War. Acceptance of guarantees for the protection and advancement of the religious, racial, and linguistic minorities, was made an integral part of the peace settlement for all the Central and Eastern European States (excluding Germany and Russia), and a condition precedent to the obtainment of the territories, boundaries, and other advantages of the peace. In the cases of Austria, Hungary, Bulgaria, and Turkey, the provisions went directly into the treaties of peace. Poland, Czechoslovakia, Roumania, Greece, and Yugoslavia were required to enter into separate Minorities Treaties. The terms are identical in all of them so far as the religious liberty sections are concerned. Five other States (Albania, Estonia, Iraq, Latvia, and Lithuania) were required to make public declarations that they would apply the same principles within their own lands as a condition for admission into the League of Nations.

The Minority protection clauses represent the high-water mark in treaty protection of inhabitants within their own State. The only safeguard left out of the Minority clauses which is found in the most far-reaching bilateral treaty, that of the United States with China in 1903, is an assurance in so many words that no restrictions will be placed upon natives joining Christian Churches. But that is seemingly inherent in the stipulation that "all inhabitants of Poland (sic) shall be entitled to the free exercise, whether public or private, of any creed, religion or belief..."

The Minorities Treaties share all the advanced qualities of the Mandate Agreements. They state that the guarantees constitute international obligations. They give the League of Nations the right to intervene to see that religious liberty is practised. And they provide that any dispute "as to questions of law or fact arising out of these Articles" shall, if another Member of the League of Nations demands, be referred to the World Court for final decision.

In three other respects the Minorities guarantees go beyond the Mandate Agreements. They categorically lay down that the State must incorporate the guarantees into its national law and permit no contravention by any law, regulation, or official action. Thus, the Polish Treaty, for example, recites: - "Poland undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognized as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them." This goes farther than any treaty has ever gone before in establishing an obligation upon a State in clear cut terms to make international law a part of the supreme law of the land and to permit no municipal law or official actions to take precedence over the international law. From the points of view of international law and the establishment of a more stable world order this is one of the most salutary achievements of the Paris Peace Settlement; one that should not be allowed to slip from hand for application on a wider scale at the end of the present war. It is comparable in historic significance to the establishment in the United States Constitutional system of the proposition that the Constitution and all laws passed under it shall be the supreme law of the land in the United States over which no state or federal statute incompatible therewith shall be lawful.

The second point of differentiation of the Minorities clauses from the Mandate Agreements' terms is in the specific provision that persons of different religious groups shall be equal before the law, and enjoy the same civic, political, and occupational rights and privileges as all other persons within the State. This was a heritage from the requirements which the European Powers had laid down for Turkey and the Eastern European States since 1830. It is particularly needful in the whole region lying between the Rhine in the west and the borderlands of India on the east, where racial, linguistic and religious differences cut so deeply into the life of crowded populations, where such an effort has

been made by each group to keep alive its peculiar differences, and where conflicting attitudes have been so assiduously cultivated. This is a phase of the religious liberty guarantee which must also be renewed, at least for this region, after the present war.

The third element of the Minorities clauses which marks an advance beyond the formulae contained in the Mandates Agreements, is unique among all the treaty protections of religious liberty. This is the inclusion of a special provision for State permission, and in some cases, State support, of separate primary schools for religious minorities where those minorities constitute a sizeable proportion of the population. The extent of this obligation was tested before the Permanent Court of International Justice on a motion of the Council of the League of Nations in 1935, after the Albanian Constitution had been amended to abolish all private schools. The Court held that the abolition, and hence the denial of separate schools to a religious minority, was not in conformity with the Declaration given by the Albanian Government as the prerequisite for its admission to membership in the League of Nations.

The Minorities guarantees were not concerned, as were the Mandate Agreements, with the rights of foreigners temporarily within the territory. Hence they do not contain permission for the entrance of missionaries. And they do not include, like the commercial treaties, provision for reciprocal rights of religious liberty for the subjects of each contracting party in the territory of the other. This one-sided nature of the undertakings, and the fact that the Great Powers were not willing at Paris to agree to the inclusion of an article in the Covenant of the League pledging all States to grant toleration of religion, led the small States that were required to sign the minorities arrangements to protest vigorously on the grounds of inequality of treatment, impairment of sovereignty, and unwarranted interference with internal affairs which were, the small States argued, to be governed by principles of democracy.

President Wilson stemmed the tide of opposition to the Minorities guarantees in one of his most eloquent speeches at the Peace Conference. He said the Supreme Council was not attempting to lay down general principles applicable to all, but was dealing with a series of urgent problems that were essentially local in character, and which arose from the transference of populations which the peace was bringing about. He argued that the Powers that had fought the war were sincerely endeavoring to make a settlement which would remove as many of the causes of war as possible. If these Powers were to guarantee the new territorial adjustments, was it not just, the President asked, that they try to remove as many elements of disturbance as they could? Rather than interfering with the small States, the Powers were trying to help them avoid just such a contingency. Pointing to the remote position of the United States, the President said: "If we agree to these additions of territory we have a right to insist upon certain guarantees of peace." Finally, the President appealed for the collaboration of all for the sake of peace and friendship, and with this soothed the feelings of the small States, convincing at least some that the Great Powers were not seeking to impose unjust conditions.

Apropos the argument of the new States that treaty agreements for the guarantee of religious liberty to minorities were not necessary in view of the democratic constitutions they were adopting, Professor Temperley, a member of the Peace Commission, observes in his History of the Peace Conference that "even in a democratic State popular passion may claim for itself legal forms, and the tyranny of racial antagonism may become the worst sort of oppression."

These arguments are quoted because it may be anticipated that any attempt to re-apply the principles of the 1919-23 Minorities Treaties will find renewed opposition at the end of the present war, particularly if universal reciprocal guarantees are not insisted upon. Other objections may also be encountered. For example, the Polish delegate at the League of Nations Assembly in 1934, asserted that the Minorities arrangements was "an ill-balanced structure, erected haphazardly and founded upon political paradoxes." It was maintained that the system violated the principle of state equality; that it was disappointing in practice and not beneficial to the minorities (an incorrect statement, judging from the records); that it served as a means of defamatory propaganda against States (which was true only where the States were repressive in their treatment of the minorities); and that it was used for influence by States not bound by the treaties (for which there is no evidence).

Answers have been made to these arguments. The arrangements were obviously related to the transfers of alien populations from one country to another. Given the historical background of persecution and denial of religious liberty in that part of Europe where the Minorities guarantees were applied, some international checks were necessary upon those States, and the majorities within them, that received territorial additions at the end of the last war.

Contemporary events point clearly to the need of continuing such international guarantees, and, if anything, on a wider territorial scale. There is much truth in the reply of the French delegate to the League Assembly in 1934 to Poland: "There are general principles underlying the protection of minorities, there are also, when we come to the question of application, special situations, situations that differ even within the same continent, from country to country. There are no general cases; there are only specific cases." The Peace Conference, he added, had tried to deal with the situation empirically.

It is submitted that on the basis of the record the guarantee system established its value to such an extent that it should be continued and certain of its features widely extended. In particular such parts would include making the protection and assurance of religious liberty an international obligation; making the guaranteeing State responsible to the international community as a whole; giving the international organization a right of intervention to end abuses; placing disputes concerning the guarantees under the jurisdiction of the World Court; and requiring the guaranteeing State to treat the protection clauses as a part of the supreme law of the land.

Summary Regarding Treaties

A survey of the treaties of commerce and amity shows that religious liberty clauses have been inserted into virtually all of the treaties of this sort in the last one hundred years where there are differences of attitude on the part of the contracting States in matters of religion. These treaties aim at securing religious liberty for the foreigner, or at most at creating a general situation in which religious work can be carried on. The practice seems to have proved beneficial in operation. Such clauses are quite legitimate in treaties of commerce, and there is no evidence of particular reluctance on the part of States to enter into such agreements, provided the undertaking is a mutual one.

Taking the commercial treaties of the United States as the guide, one of two different formulae have been generally employed, with the exception of the China treaties.

One is the form used in the 19th century treaties with the Latin American countries. This recites:

"It is agreed that perfect and entire liberty of conscience shall be enjoyed by the citizens of both the contracting parties in the countries subject to the jurisdiction of the one or the other, without their being liable to be disturbed or molested on account of their religious belief, so long as they respect the laws and established usages of the country."

The other form is that used in a group of commercial treaties concluded since 1923. The following is a sample of the new formula:

"The nationals of each of the High Contracting Parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in professional, scientific, religious, philanthropic... work of every kind without interference;... to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic... purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence or of nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

"The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law...

"The nationals of each of the High Contracting Parties in the exercise of the right of freedom of worship, within the territory of the other, as hereinabove provided, may, without annoyance or molestation of any kind by reasons of their religious belief or otherwise, conduct services either within their own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public morals; and they may also be permitted to bury their dead according to their religious customs in suitable and convenient places established and maintained for the purpose, subject to the reasonable mortuary and sanitary laws and regulations of the place of burial."

Experience and the Committee's reports may yet tell conclusively how satisfactory this last formula is in actual practice from country to country. From the point of view of the Protestant worker, the chief criticism is the emphasis which the treaty places upon the foreigner being allowed to do what the native may, "submitting to conditions imposed upon its nationals." In Moslem, and certain other lands, local laws and regulations may severely restrict what the native Protestant, or Catholic, may do; therefore, what the foreign worker can do. Somewhat less emphasis upon this point might be desirable. However,

attention must be paid to the drafting of treaty terms which will prevent discrimination against the foreigner as such.

The present United States commercial treaty formula may be a satisfactory general basis of reference. Modification might be made in some details in treaties which may be concluded with certain countries, for each treaty ought to be negotiated in the light of circumstances relating to local conditions abroad.

One cannot say, perhaps, even in view of all the bilateral treaties which provide for liberty of conscience and freedom of worship, that there is a principle of international law requiring each State to accord religious liberty to natives and foreigners. One can say, however, that a custom of making such provision for foreigners, on a mutually reciprocal basis, has been widely established by treaty for over one hundred years. Therefore, religious and missionary interests may quite properly ask the Government to include such provisions in commercial treaties negotiated after the present War.

The multilateral treaties of peace and of cession of territory, the Mandates the Minorities Treaties, and the agreements required of certain new States after the end of the last World War, - all these deal in one way or another with the transfer of populations from the control of one political rule to another.

Regarding such arrangements, Judge Manley O. Hudson wrote in 1921 in Colonel House's What Really Happened at Paris, "for almost a century it had been an established practice, if not a principle of the public law of Europe, that guarantees to religious minorities should be included among provisions dealing with the transfer of territory inhabited by heterogenous people."

Coupling this historical fact with Secretary of State Hay's assertion in 1902 that religious toleration is a "principle of international law and eternal justice," Judge Hudson adds, "the Paris Peace Conference has entrenched that principle. And it has extended the protection to racial and linguistic groups as well. It has created in this field a new body of public law, which constitutes a notable contribution to the effort to get international justice through law rather than without law."

From a conservative juridicial point of view, it may be said that the assurances of religious liberty to colonial, transferred, and minority populations may still rest upon express treaty stipulations. Nevertheless, the practice of covering this by international agreement has achieved impressive consistency, in principle if not in all details.⁽²⁾ And there can be no doubt of the propriety of endeavoring to renew such guarantees, in the same or some different form, after the conclusion of the present War.

(2) The Minorities Treaties were signed by 9 or 10 States in each case; 23 States signed the Treaty of Peace with Austria (containing identical provisions), and with Hungary; 22 States signed the treaty with Bulgaria; 8 the treaty with Turkey. 22 bilateral conventions were signed by various European States following the peace settlement which provided for the protection of religious minorities. 32 States signed the Treaty of Versailles containing the Covenant of the League establishing the Mandate system; and 48 States Members of the League in 1920 accepted and indirectly approved the Mandate terms providing for religious liberty in the Mandates.

A Universal Obligation to Guarantee
Religious Liberty

At the Paris Peace Conference President Wilson pressed for the inclusion of an article in the Covenant of the League of Nations providing for religious liberty everywhere. This idea was put forward in three different versions during the debate upon the Covenant.

The first draft read:

"Recognizing religious persecution and intolerance as fertile sources of war, the Powers signatory hereto agree, and the League of Nations shall exact from all new States and all States seeking admission to it the promise, that they will make no law prohibiting or interfering with the free exercise of religions, and that they will in no way discriminate, either in law or in fact, against those who practice any particular creed, religion, or belief whose practices are not inconsistent with public order or public morals."

The second draft varied only slightly, leaving out the preamble:

"The High Contracting Parties agree that they will make no law prohibiting or interfering with the free exercise of religion, and they resolve that they will not permit the practice of any particular creed, religion, or belief, whose practices are not inconsistent with public order or with public morals, to interfere with the life, liberty or pursuit of happiness of their people,"

Mr David Hunter Miller remarks that it is impossible to suppose that President Wilson drafted this second proposal, the language is so confusing and the meaning so doubtful.

The final proposal turned the phraseology one point further:

"The High Contracting Parties agree that they will not prohibit or interfere with the free exercise of any creed, religion or belief whose practices are not inconsistent with public order or public morals, and that no person within their respective jurisdictions shall be molested in life, liberty, or the pursuit of happiness by reason of his adherence to any such creed, religion or belief."

Notwithstanding the lofty motives which Dr. Dillon (The Inside Story of the Peace Conference) says inspired President Wilson's determination to have such an article "passed at all costs," opposition arose from nearly every quarter. The President's argument was that "as the treatment of religious confessions has been in the past, and may again in the future be a cause of sanguinary wars, it seems desirable that a clause should be introduced into the Covenant establishing absolute liberty for creeds and confessions. "

The arguments employed against the President's drafts were numerous. The British argued that this was "a matter of internal government which it is almost impossible for the League of Nations to supervise or enforce; that it would be better to settle such questions, where there was pressing need for an international arrangement, in the several territorial treaties which would be guaranteed by the League. In addition Lord Cecil pointed out that the British Constitution forbade religious equality for the Catholic Church (particularly in the matters of State establishment, and the eligibility of an individual Catholic to the throne), and intimated that the British people could not accept an obligation to alter their Constitution. The French and Belgian representatives opposed the article on the ground that it would raise issues within their States which had disturbed their domestic tranquility in the past and which were then quiescent. The Italians pointed to their special relation to the Vatican and said that in all matters of religion they must proceed with the "greatest circumspection." Other delegates saw in this article a wedge for interventions, an attempt of the Anglo-American Powers to dominate the affairs of others, and an effort to get special privileges for the Jews. These arguments deserve careful note, for they may well be raised again if efforts are made to obtain a guarantee of religious liberty in some Charter of Rights at the end of the present War.

The article in question was torpedoed and sunk by Baron Makino of Japan, who introduced an amendment that Members of the League must accord equal and just treatment to all alien nationals of States Members of the League "making no distinction, either in law or in fact, on account of their race or nationality." At this point all delegations, including the American and British Dominions, agreed with M. Venizelos when he admonished the Conference that "it would be well to suppress the article concerning religious liberty, for it is an extremely delicate question and we run the risk of meeting insurmountable difficulties."

Mr David Hunter Miller remarks in his volume on Drafting of the Covenant, that Baron Makino's proposal "helped make impossible any article on religious liberty in any form; any such article in the Covenant would have been most dangerous, and perhaps fatal to the League; the subject was never again considered."

Although President Wilson's article did not get into the Covenant as such, and thereby become binding upon all Members of the League of Nations, its principles were applied, and its influence was manifest in the arrangements which were drawn up for the Mandates and the Minorities Treaties.

Efforts were made on a number of occasions between 1920 and 1939 to get the obligation to protect religious liberty extended to all States. But these moves were always related to the effort to get the treaty obligations regarding minorities universalized. And these efforts came to naught.

CONCLUSION

In conclusion, then, one is bound to say that up to the present time there is no general agreement that every State is under a uniform international, legal obligation to grant or secure religious liberty and religious equality to all persons within its jurisdiction.

The Great Powers have been willing to formulate, and even to enforce, an international obligation for religious liberty in several parts of the world where religious liberty is jeopardized or denied, or where there have been deplorable persecutions. The Powers have also been ready to conclude an extensive network of bilateral commercial treaties containing articles assuring religious liberty to

their respective nationals in each other's territory.

RECOMMENDATIONS FOR THE FUTURE

The recommendations listed below for action in the future designed to further the cause of religious liberty are tentative and incomplete. Recommendations of a more specific nature for particular treaties, and for the general peace arrangements at the end of this war, must await a completion of the factual-situation Survey being conducted at the present time under the auspices of the Committee on Religious Liberty. When all of these reports are in and can be studied, more constructive suggestions can be offered.

Certain generalized lines of approach to the future suggest themselves on the basis of the foregoing study.

1. An effort should be made to formulate drafts of laws for suggested adoption within certain countries, as the first place the individual must look for religious liberty is to the laws of the country in which he is located. If the standard of legal protection can be raised from within countries, so that there may be eventually some approximation of a minimum standard of liberty, there need be less resort to the attempt to obtain guarantees by means of international treaties.

2. Study should be given to the revision of the guarantees contained in some commercial treaties. One draft could be prepared for general reference, with modifications introduced where the local conditions in certain foreign countries indicate that such may be desirable or necessary. All bilateral treaty arrangements for religious liberty contained in commercial treaties might well be reconsidered when full details are in the hands of the Committee on Religious Liberty following the completion of the Survey.

3. An international guarantee for dependent areas should be drawn up. It is possible that the principles incorporated into the General Act of Berlin and into the Mandate Terms can be consolidated. Certainly the principle of making the party administering a backward area responsible to the international community and its over-all organization should be continued. So should the reference of disputes to the Permanent Court of International Justice. And the principle embodied in the Minorities Treaties of requiring the parent State to incorporate the religious liberty guarantees into the supreme law of the land should be perpetuated and extended.

4. Guarantees of this same kind should be drafted for use in cases where territories containing peoples of heterogenous religious and racial affiliation are transferred from one country to another.

5. Attention should be given to a Charter of the Rights of Man, or an International Bill of Human Rights, which would include among other things stipulations for liberty of conscience and freedom of worship, -- the most elementary parts of religious liberty. It is doubtful whether an effort to include equality of religions would meet with success.

6. Thought should be devoted to the wisdom of linking all these various obligations together under the jurisdiction of a Religions Commission made a part of the post-war International Organization. This Commission should have at least

the powers of the Mandates Commission and the Council of the League of Nations combined, that is, of requiring regular reports on religious liberty, of intervening to obtain a change of local law or administration, of referring disputes as to questions of law or of fact to the national courts or to the Permanent Court of International Justice.

The United Nations have declared that they are fighting this War in order that among other things they may establish "the bases of a just and enduring world peace securing order under law to all nations," convinced "that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands." It remains to clothe these generalizations with meaning and force through treaties and laws which will come into force when the processes of peace supplant those of war.

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NOTE: Dr Padelford has prepared a Chart of Treaty Provisions for Religious Liberty from 1782 A.D. This is available in photostatic copy at the office of the International Missionary Council, 156 Fifth Avenue, New York City, for \$1.00.

